No. 89-479

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

LEONARDO BENITEZ and JOHN LEADBEATER,

Petitioners,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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64 pp

QUESTION PRESENTED FOR REVIEW

Whether an interstate railroad corporation, owned by an entity created by Interstate Compact with the consent of Congress, is entitled to State immunity under the Eleventh Amendment in a suit in federal court under the Federal Employers Liability Act, and if so, whether by the laws of the Contracting States and the Compact itself, such immunity has been expressly waived and suit expressly consented to in Federal Court.

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No.

In The

Supreme Court of the United States

October Term, 1989

LEONARDO BENITEZ and JOHN LEADBEATER,

Petitioners,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Leonardo Benitez and John Leadbeater, petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 24, 1989.

OPINIONS BELOW

The Judgment of the Third Circuit Court of Appeals was entered April 24, 1989, and is reproduced in the Appendix to this petition (App. at 4a). The Order of May 30, 1989 denying rehearing with five judges dissenting is contained in the Appendix to this petition (App. at 2a). Amendment of the Order denying rehearing, dated July 3, 1989, is found in the Appendix (App. at 1a). The opinions and orders in the District Court of New Jersey of district judges Maryanne Trump Barry in *Benitez v. Port Authority Trans-Hudson* and Nicholas H. Politan in *Leadbeater v. Port Authority* dismissing the actions for want of federal jurisdiction under the Eleventh Amendment are reproduced in the Appendix to this petition (App. at 31a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 24, 1989. The Order denying Rehearing was filed May 30, 1989 then amended July 3, 1989. Five Judges in active service voted in favor of rehearing in banc.

This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article 1, Section 10, cl.3, of the United States Constitution:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded,

or in such imminent Danger as will not admit of delay.

2. The Eleventh Amendment to the Constitution of the United States:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. 45 U.S.C. § 51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

4. 45 U.S.C. § 56:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

5. Portions of Joint Resolution Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the Port of New York, August 23, 1921, 42 Stat. 174 et seq.

> ART. 3. There is hereby created "The Port of New York Authority" (for brevity hereinafter referred

to as the "port authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other, or by Act or Acts of Congress, as hereinafter provided.

ART. 7. The port authority shall not pledge the credit of either State except by and with the authority of the legislature thereof.

ART. 8. Unless and until otherwise provided, all laws now or hereafter vesting jurisdiction or control in the public service commission, or the public utilities commission, or like body, within each State, respectively, shall apply to railroads and to any transportation, terminal, or other facility owned, operated, leased, or constructed by the port authority, with the same force and effect as if such railroad, or transportation, terminal, or other facility were owned, leased, operated, or constructed by a private corporation.

ART. 18. The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the Constitution of the United States or of either State, and subject to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both States, shall be binding and effective upon all persons and corporations affected thereby.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the said agreement, and to each and every part and article thereof: *Provided*, That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement.

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6. Portions of the Joint Resolution Granting consent of Congress and authority to the Port of New York Authority to execute the comprehensive plan approved by the States of New York and New Jersey by chapter 43, Laws of New York, 1922, and chapter 9, Laws of New Jersey, 1922, July 1, 1922, 42 Stat. 822 et seq.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution, the consent of Congress is hereby given to the supplemental agreement between the States of New York and New Jersey . . .

And the consent of Congress is hereby given to the carrying out and effectuation of said comprehensive plan, and the said Port of New York Authority is authorized and empowered to carry out and effectuate the same: *Provided*, That nothing herein contained shall be construed as impairing or in any manner affecting any right or

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impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement:

7. McKinney's Unconsolidated Laws of New York § 7101;

McKinney's Unconsolidated Laws of New York § 7106;

McKinney's Unconsolidated Laws of New York § 6416;

McKinney's Unconsolidated Laws of New York § 6418;

N.J.S.A. § 32:1-157;

N.J.S.A. § 32:1-162;

N.J.S.A. § 32:1-16

These statutes are reproduced in the Appendix (App. at 41a).

STATEMENT OF THE CASE

John Leadbeater and Leonardo Benitez, petitioners, were railroad workers employed by respondent, Port Authority Trans-Hudson Corporation ("PATH") when they were injured in the course of their employment and brought suit in the United States District Court of New Jersey under the Federal Employer's Liability Act ("FELA") for their injuries, 45 U.S.C. § 56. PATH is the wholly owned subsidiary of the Port Authority of New York and New Jersey ("Port Authority") operating the commuter railroad between those two States.

Both actions were dismissed in the District Court on the sole ground that PATH enjoys Eleventh Amendment immunity from suit since its parent, The Port Authority shares the immunity of

the contracting states of New York and New Jersey under the Eleventh Amendment.

A seasonable appeal was taken in each case to the United States Court of Appeals for the Third Circuit and both appeals consolidated for decision.

The Court of Appeals affirmed, concluding that PATH has Eleventh Amendment immunity and has not expressly waived such immunity. *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45 at 50 (3d Cir. 1989) (App. 29a). Rehearing was denied by a divided court, with five judges voting in favor of rehearing in banc (App. 2a). The Order denying rehearing was subsequently amended, upon seasonable application by petitioners, to conform the denial of rehearing to the Internal Operating Procedures of the Third Circuit.

REASON FOR GRANTING THE WRIT

The decision below that the Port Authority of New York and New Jersey is the state for Eleventh Amendment purposes creates a substantial conflict with the contrary opinion of the Second Circuit disallowing immunity.

The decision in this case is in conflict, on the same subject matter and involving the same respondent, with the contemporaneous decisions of the United States Court of Appeals for the Second Circuit in *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628, reh. den, F.2d (2d Cir. 1989) (App. 4a) and *Foster v. Port Authority Trans-Hudson Corporation*, 873 F.2d 633 (2d Cir. 1989). The Third Circuit expressly relied on the lower court decisions in *Feeney* and *Foster* in the Southern District of New York to support its determination of Eleventh Amendment immunity, yet when the Court was apprised that those two cases were overturned by the Second Circuit, rehearing was

nevertheless denied. However, five judges of the Third Circuit, including a member of the original panel, voted for rehearing in banc implicitly recognizing that a substantial conflict has been created regarding the status of a major interstate railroad responsible for the daily carriage of thousands of commuters.

On the same facts regarding the status of the Port Authority, the two Circuits thus came to dramatically opposite results within days of each other, with the Second Circuit concluding the Port Authority is not immune under the Eleventh Amendment, but assuming *arguendo* it ever had such immunity, it was expressly waived and the Port Authority expressly consented to suit in the federal court. The Second Circuit found that a judgment against PATH is not enforceable against either New York or New Jersey. *Feeney*, at 631 (App. 17a), which finding satisfies one of the major indicia in determining whether an entity warrants Eleventh Amendment protection. *Edelman v. Jordan*, 415 U.S. 651 (1974). No finding on this was made by the Third Circuit.

Because PATH conducts its interstate railroad operation exclusively between New York and New Jersey, this significant conflict involves the only two Circuit Courts of Appeal which treat with respondent and its railroad employees, and therefore directly impacts on the right of injured railroad workers working for this interstate railroad corporation to have their FELA suits heard in the federal court in New Jersey. Should the conflict remain unresolved, injured railroad workers employed by PATH would exclusively use the federal court in New York rather than New Jersey thus creating an unequal burden in the Southern District. Resolution of the conflict is, therefore, necessary since the right of an injured railroad worker to bring suit in federal court under the FELA, 45 U.S.C. § 56 should not hinge on which of two Circuits he happens to bring it.

Where, as here, the railroad corporation is not "one of the

United States" or a department of the government of a State, but rather a body created under an Interstate Compact, and the consent given by Congress to the Compact under Article 1, Section 10, cl.3 of the Constitution reserves federal power and jurisdiction, altogether different concerns are implicated than were present in *Welch v. State Department of Highways and Public Transportation*, 483 U.S. 468 (1987) where this Court held the Eleventh Amendment barred suit by a seaman in federal court under the Jones Act, 46 U.S.C. § 688 against his employer, the State of Texas. In this case neither the Attorney General of New York or New Jersey appeared to claim the States Eleventh Amendment immunity.[1] Neither State or any of its officers are parties.

Neither reason or law supports the Third Circuit's decision since the Port Authority is autonomous and neither State is the real party in interest. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984). Within the evolving Eleventh Amendment jurisprudence of this Court — most recently expressed in *Pennsylvania v. Union Gas Co.*, 491 U.S. ____ , 109 S.Ct. ____ , 105 L.Ed. 2d 181 (1989) and *Dellmuth v. Muth*, 491 U.S. ____ , 109 S.Ct. 105 L.Ed. 2d 181 (1989) — the principle emerges that the Eleventh Amendment's purpose is to keep the constitutional structure between State and Federal authority in balance by limiting federal judicial power. Such concern is no way threatened or disturbed by the imposition of such power on an entity whose very creation was stamped with the birthmark of reserved federal power and supremacy.

---

1. Even in circumstances where a railroad corporation is defended by the Attorney General of the State who claims the corporation possesses an attribute of state sovereignty, the Third Circuit applied a stringent test to such a claim. In *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir. 1989) *Petition for Certiorari pending* at No. 89-100 the railroad corporation failed to meet that test and the Court rejected the Eleventh Amendment claim of immunity.

The Compact consented to by Congress in 1921 provides in Article 7 that The Port Authority cannot pledge the credit of either state except by and with the authority of the two legislatures. 42 Stat. 177. The Joint Resolution of Congress, in approving the Compact, expressly reserved full federal power, and with specific regard to railroads provided in Article 8 that they be treated as if "owned, leased, operated or constructed by a private corporation." 42 Stat. 177.

Article 18 of the Compact acknowledges that the Port Authority's power to make rules and regulation is "subject to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce." 42 Stat. 178.

Furthermore, should the Port Authority's revenues be inadequate to meet expenses, each state is only bound to "appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the [P]ort [A]uthority and approved by the governors of the two states, but . . . *only to the extent of one hundred thousand dollars in any one year.*" McKinney's Unconsolidated Laws § 6416. The Port Authority is, as this Court earlier recognized a "financially independent entity with funds primarily derived from private investors." *United States Trust Co. of New York v. New Jersey*, 431 U.S.1, (1977). Indeed, in the Petition for Certiorari recently filed in *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir. 1989), *Pet. Cert.* No. 89-100 *sub nom. New Jersey Transit Rail Operations, Inc. v. Fitchik, et al.* by the Attorney General of New Jersey it is expressly stated by the highest legal officer of that State that the "the Port Authority . . . is *totally* supported by user revenues" *New Jersey Transit Rail Operations, Inc.*, Petition for Certiorari, footnote beginning page 12 (italics added). The treasuries of neither State are at risk and by no stretch of the judicial imagination

would a judgment against PATH be a monetary award against either State.

In 1950 and 1951 New York and New Jersey enacted legislation, which is reproduced in the Appendix, "consent[ing] to suits, actions or proceedings of any form or nature at law, in equity or otherwise . . . against the [Port Authority] . . . " and venue for such actions against the Port Authority, consented to by this waiver, including actions in tort, expressly encompasses the federal courts. The same legislation categorically provides that in such suits the Port Authority is to be judicially treated "to the same extent as though it were a private corporation." When confronted with these provisions the Court below expressed "some unease" but went ahead and found the Port Authority immune relying on the lower court decision in *Foster. Leadbeater, supra,* at 49 (App. 8a). That approach conflicts directly with the approach taken by the Second Circuit, and with the law regarding Eleventh Amendment immunity of non-State bodies.

In *Lake County Estates v. Tahoe Planning Agency*, 440 U.S. 391, 400 (1979), an "expansive reading" of the Eleventh Amendment for bodies created by interstate compact, was expressly rejected by this Court:

> "*Unless* there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the [Eleventh] Amendment." (italics added).

There is nothing in either the history of its creation or the circumstances of its operation which gives the Port Authority the

right to claim the Eleventh Amendment immunity of the State for itself. It is clear that Congress never concurred in any limitation on federal power by the creation of this Authority, but rather expressly affirmed and reaffirmed that what it was creating was "subject to the exercise of the power of Congress for the improvement of the conduct of navigation and commerce" 42 Stat. 178, and that nothing in the Compact "shall be construed as impairing *or in any manner* affecting *any* right or jurisdiction of the United States" 42 Stat. 180. In *Petty v. Tennessee — Missouri Bridge Commission*, 359 U.S. 275 (1959) similar language, given its proper construction under federal law, *id* at 278-79, was sufficiently persuasive of the intent of Congress to deny Eleventh Amendment immunity to the entity.

Finally, and paradoxically, when the Second Circuit decided *Feeney* on April 26, 1989 it was not aware that *Leadbeater* had been decided two days earlier. But with an even earlier decision of the Third Circuit in *Port Authority Police Benevolent Ass'n, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir.) *cert. denied* ____ U.S. ____ , 108 S.Ct. 344, 98 L.Ed. 2d 370 (1987) before it, the makings of a conflict was felt, enough to cause the Second Circuit to invite this Court to resolve the conflict. *Feeney, supra* at 631-32 (App. 23a-24a).

With the decision in *Leadbeater* that conflict has now been actualized.

CONCLUSION

For the above stated reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AMENDING DENIAL OF REHEARING DATED JULY 3, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5372

JOHN LEADBEATER,

Appellant,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION.

No. 88-5375

LEONARDO BENITEZ,

Appellant,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION.

ORDER

The Court's order of May 30, 1989, denying appellants Petition for Rehearing is amended to include that:

No member of the panel having requested panel rehearing, such rehearing is denied. The period for petitioning for certiorari will commence with the filing of this amended order.

s/ Robert E. Cowen
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING DATED MAY 30, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5372

John Leadbeater,

Appellant,

v.

Port Authority Trans-Hudson Corporation.

Appeal from the United States District Court for the District of New Jersey - Newark D.C. Civil No. 86-5103

No. 88-5375

Leonardo Benitez,

v.

Port Authority Trans-Hudson Corporation,

Leonardo Benitez,

Appellant.

Appeal from the United States District Court for the District of New Jersey - Newark D.C. Civil No. 87-1365

Appendix B

SUR PETITION FOR REHEARING

Present:

GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges*.

The petition for rehearing in banc filed by appellants, John Leadbeater and Leonardo Benitez, in the above captioned matters having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Gibbons, Judge Higginbotham, Judge Becker, Judge Stapleton and Judge Hutchinson would have granted the petition for rehearing in banc.

By the Court,

s/ Seitz
Circuit Judge

APPENDIX C — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN LEADBEATER V. PORT AUTHORITY TRANS-HUDSON CORPORATION DATED APRIL 24, 1989 (NOW REPORTED 873 F.2d 45)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-5372

John Leadbeater
Appellant,

v.

Port Authority Trans-Hudson Corporation

Appeal from the United States District Court
for the District of New Jersey - Newark

D.C. Civil No. 86-5103

NO. 88-5375

Leonardo Benitez

v.

Port Authority Trans-Hudson Corporation

Leonardo Benitez
Appellant,

Appeal from the United States District Court
for the District of New Jersey - Newark

D.C. Civil No. 87-1365

Appendix C

Argued November 29, 1988

BEFORE: SEITZ, STAPLETON and COWEN, *Circuit Judges*.

Filed: April 24, 1989

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

I.

Plaintiffs John Leadbeater and Leonardo Benitez brought these actions against defendant Port Authority Trans-Hudson Corporation (P.A.T.H.), a commuter railroad, under the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. §§ 51 - 58 (1982). The district court dismissed both cases, holding them barred by the eleventh amendment to the United States Constitution. We have jurisdiction of this consolidated appeal under 28 U.S.C. § 1291 (1982).

II.

Leadbeater and Benitez were P.A.T.H. employees who sustained injuries while on duty at that commuter

railroad. Under the F.E.L.A., "[e]very common carrier by railroad while engaging in commerce between any of the several States" is liable to its employees for injuries suffered on the job. 45 U.S.C. § 51. F.E.L.A. further provides for jurisdiction in the district courts concurrent with state court jurisdiction, *id.* § 56.

P.A.T.H. is a wholly owned subsidiary of the Port Authority of New York and New Jersey (Port Authority). The Port Authority was created in 1921 by an interstate compact between New York and New Jersey. This interstate compact was approved by Congress in a Joint Resolution pursuant to the compact clause of the United States Constitution.[1]

This appeal presents the discrete question whether plaintiffs' suits in federal court against P.A.T.H. are barred by the eleventh amendment. In *Port Authority Police Benevolent Association v. Port Authority*, 819 F.2d 413 (3d Cir.), *cert. denied*, 108 S. Ct. 344 (1987), we concluded that the Port Authority is an arm of the compacting states entitled to eleventh amendment immunity. The legislatures of New York and New Jersey have explicitly stated that P.A.T.H. "shall have all of the privileges [and] immunities ... of the Port Authority." N.J. Stat. Ann. § 32:1-35.61 (West 1963); N.Y. Unconsol. Laws § 6612 (McKinney 1979). P.A.T.H. contends that as a matter of federal law it has eleventh amendment immunity to the same extent as the Port Authority. Plaintiffs do not contend otherwise, and therefore we proceed on that premise.

III.

Eleventh amendment immunity can be avoided by congressional abrogation, or by state consent to suit in federal court. *See Welch v. Texas Dep't of Highways*

1. "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State ..." U.S. Const. Art I, § 10.

and Public Transportation, 107 S. Ct. 2941, 2945 - 46 (1987) (plurality opinion). Plaintiffs argue that P.A.T.H. has waived its eleventh amendment protection by its agreement to accept benefits under the Urban Mass Transportation Act, 49 U.S.C. § 1601, *et seq.* They also argue that the state statutes consenting to suit against the Port Authority are an express waiver of P.A.T.H.'s eleventh amendment immunity. They finally argue that P.A.T.H.'s eleventh amendment immunity has been removed by congressional approval of an interstate agreement between New York and New Jersey. *See Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959).

A.

Plaintiffs first argue that P.A.T.H. has waived its eleventh amendment immunity to suit in federal court as a condition of its participation in a federal program under the Urban Mass Transportation Act (U.M.T.A.), 49 U.S.C. app. § 1601, *et seq.* Plaintiffs inform us that, as permitted by the U.M.T.A., 49 U.S.C. app. § 1608(f)(1), P.A.T.H. has petitioned for and received exemption from Interstate Commerce Commission regulation -- including rate regulation -- otherwise provided for by the Interstate Commerce Act. P.A.T.H does not dispute this. We are required to decide the significance of P.A.T.H.'s participation in this program.

The U.M.T.A. provides that an agency such as P.A.T.H. "granted such an exemption ... shall be subject to all applicable federal laws related to (A) safety ..." 49 U.S.C. app. § 1608(f)(2). Plaintiffs argue that in accepting the benefit of the regulatory exemption under the U.M.T.A., P.A.T.H. has consented to suit in federal court. They point out that many of the safety statutes made applicable to P.A.T.H. provide for

jurisdiction in the district court. They contend that these include among their number the F.E.L.A. *See* 45 U.S.C. § 56.

Plaintiffs' argument is a difficult one to maintain. Before such implicit waiver will be found we must conclude that the language of the federal statute, the U.M.T.A., "manifest[s] a clear intent to condition participation ... on a state's consent to waive its constitutional immunity." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (spending clause enactment). We do not believe that the U.M.T.A.'s language subjecting a state to "laws related to safety" is sufficiently clear to permit us to find, in P.A.T.H.'s petition for and acceptance of the regulatory exemptions, consent to suit in federal court under the F.E.L.A. Simply put, such a general statement by Congress does not have the specificity *Atascadero* requires.

B.

Plaintiffs next contend that P.A.T.H.'s eleventh amendment immunity was waived by the statutes in which the states of New York and New Jersey consented to suits against the Port Authority. Those statutes, enacted by both New York and New Jersey, provide that "[t]he states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise ... against the Port Authority." N.J. Stat. Ann. § 32:1 - 157 (West 1963); N.Y. Unconsol. Laws § 7101 (McKinney 1979).[2]

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2. *Port Authority Police Benevolent Association v. Port Authority*, 819 F.2d 413 (3d Cir.), *cert. denied*, 108 S. Ct. 344 (1987), did not squarely address the implications of this consent to suit provision in the context of either related legislation or congressional approval of an interstate compact under the compact clause. We do not read our decision in *Port Authority Police Benevolent Association* to foreclose our consideration of these issues.

Appendix C

For purposes of this sub-section we will assume the construction of these statutes simply presents a question of express state waiver of immunity. Two federal court decisions have, without discussion, considered the construction of these statutory provisions consenting to suits against the Port Authority under this approach. *See Foster v. Port Authority Trans-Hudson Corp.*, No. 87 Civ. 4593 (MGC), slip op. at ———, 1988 W.L. 112904 (S.D.N.Y. Oct. 17, 1988); *Feeney v. Port Authority Trans-Hudson Corp.*, 693 F. Supp. 34 (S.D.N.Y. 1988).[3]

A state consent to suit statute does not necessarily work a waiver of eleventh amendment immunity. A state can waive its sovereign immunity from suit in state court without waiving the eleventh amendment's bar to suits against the state in federal court. *Atascadero State Hospital v. Scanlon*, 473 U.S. at 234. The test for waiver of eleventh amendment immunity is stringent. Consent to suit in federal court must be by "most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Welch*, 107 S. Ct. at 2946 (plurality opinion) (*quoting Edelman v. Jordan*, 415 U.S. 651, 673 (1974)) (additional citation omitted). "In order for a state statute or constitutional provision to constitute a waiver of eleventh amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." *Atascadero*, 473 U.S. at 241. Under this test the consent provisions, N.J. Stat. Ann. § 32:1 - 157; N.Y. Unconsol. Laws § 7101, standing alone are

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3. In Section III. C., *infra*, we address plaintiffs' alternative argument that these provisions must be construed only to ascertain congressional intent in approving an interstate compact. *See Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959).

insufficient to constitute a waiver of P.A.T.H.'s eleventh amendment immunity.[4]

The acts that contain the consent provisions, however, also provide that "[t]he foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the Port Authority shall be laid within a county or a judicial district established by one of the said states or by the United States, and situated wholly or partially within the Port of New York District." N.J. Stat. Ann. § 32:1-162 (West 1963); N.Y. Unconsol. Laws § 7106 (McKinney 1979). Plaintiffs argue that the necessary implication of providing for venue in a federal judicial district is that the consent provisions were intended to waive P.A.T.H.'s eleventh amendment immunity from suit in federal court.

It is certainly arguable that the consent to suit statutes, read in light of this venue provision, create the "overwhelming implication" of consent to suit in federal court. The defendant suggests, in opposition, that the provision for venue in certain federal districts is intended to apply to actions over which there is some basis for federal jurisdiction independent of the consent provisions. It is not apparent to us that the venue provision applies in such cases, where consent to suit is not required. But whatever the purpose of this part of Section 32:1-162, we think the Supreme Court, by requiring proof of consent by "overwhelming implication," mandates that there be much more than inclusion of a reference to a federal judicial district in a venue provision. Not without some unease, we

4. *Raysor v. Port Authority*, 768 F.2d 34, 38 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986), read the consent to suit provisions to permit suit against the Port Authority in federal court. While *Raysor* did not address the eleventh amendment, to the extent it holds that the Port Authority's eleventh amendment immunity was waived by the consent to suit provisions, we are in disagreement with it.

conclude that the venue provision fails to constitute the requisite showing that the states intended to waive P.A.T.H's eleventh amendment immunity. *See Foster*, No. 87 Civ. 4593 (MGC), slip op. at ———, 1988 W.L. 112904 (S.D.N.Y. Oct. 17, 1988).[5]

C.

Lastly, plaintiffs rely on the theory of *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). In that case, the Supreme Court held that Congress had conditioned its approval of an interstate compact that included a sue-and-be-sued provision upon implicit state waiver of eleventh amendment immunity. *See id.* at 281 - 82. The plaintiffs argue that Congress here similarly conditioned its approval on a waiver of the Port Authority's eleventh amendment immunity. Treating the meaning of the sue-and-be-sued provision as a question requiring examination of congressional intent is consistent with the approach taken by the Second Circuit Court of Appeals in analyzing a consent to suit provision in an interstate compact in *Trotman v. Palisades Interstate Park Comm'n*, 557 F. 2d 35, 39 (2d Cir. 1977).

In *Petty*, the Supreme Court ruled that the construction of an interstate compact sanctioned by Congress under the compact clause was a question of federal law. *Id.* at 278 - 79. The compact in *Petty* created the Tennessee-Missouri Bridge Commission,

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5. We also observe that the legislative histories of the New York and New Jersey acts containing both the consent and the venue provisions do not explicitly address eleventh amendment immunity. *But cf.* New York State Legislative Annual 204 (1950) (including a decision dismissing on eleventh amendment grounds a suit against the Port Authority in federal court, *Howell v. Port of New York Authority*, 34 F.Supp. 797 (D.N.J. 1940), in a list of cases holding that the Port Authority "share[s] the governmental immunity of the states themselves").

and gave it power to operate ferries across the Mississippi River. The compact gave the Commission the power to "sue and be sued in its own name." *Id.* at 277. Congressional approval of the interstate compact in that case was on condition that the compact not "be construed to affect, impair or diminish any right, power or jurisdiction of ... any court ... of the United States over or in regard to any navigable waters or any commerce between the States." *Id.* at 281.

The Supreme Court concluded that "[t]his proviso, read in light of the sue-and-be-sued clause in the compact reserves the jurisdiction of the federal courts to act in any matter arising under the compact over which they would have jurisdiction by virtue of the fact that Mississippi is a navigable stream and that interstate commerce is involved." *Id.* As the Supreme Court explained in *Edelman v. Jordan*, 415 U.S. 651, 672 (1974), "[t]he question of waiver or consent under the Eleventh Amendment was found in [*Petty*] to turn on whether Congress had intended to abrogate the immunity in question, and whether the state by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity."

Since it decided *Petty*, the Supreme Court has held that congressional intention to abrogate eleventh amendment immunity "must be expressed in unmistakably clear language." *E.g., Welch*, 107 S. Ct. at 2948 (plurality opinion). To the extent that *Petty* suggests that general congressional language can work an abrogation of state eleventh amendment immunity, we do not believe it retains any vitality in light of the Supreme Court decisions in *Atascadero* and *Welch*. Although the plurality in *Welch* did not expressly overrule *Petty*, explaining that that case "involved an interstate compact that expressly permitted the bi-state corporation to sue and be sued," *Welch*, 107 S.

Ct. at 2947 n.7, we do not believe that the clear statement requirement applies with any less force where Congress speaks in a Joint Resolution approving an interstate compact than where it speaks through any other legislative enactment.

In the case before us, the interstate compact that created the Port Authority was approved subject to a congressional condition similar to, albeit more general than, the one in *Petty*.[6] This congressional proviso states that the compact "shall not be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement." 42 Stat. 174, 177 (1921). We do not believe this general language upon which Congress's approval of the interstate compact was conditioned speaks with sufficient clarity to abrogate P.A.T.H.'s eleventh amendment immunity. *See Welch*, 107 S. Ct. at 2948 (plurality opinion).

IV.

Consequently, because we conclude that P.A.T.H. retains its eleventh amendment immunity, the orders of the district court will be affirmed.

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6. In this case, the Port Authority's sue-and-be-sued provision was not a part of the compact when it was approved by Congress. Rather, it was enacted some thirty years later by the legislatures of New York and New Jersey pursuant to congressional authorization in Article 7 of the compact which reads "[t]he port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other." 42 Stat. 174, 177 (1921).

We assume without deciding that this joint state legislative action authorized in advance by Congress constitutes an interstate compact. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Of course, any suggestion that Congress actually considered the implications of its approval of the compact here on the Port Authority's eleventh amendment immunity would be an obvious fiction. *Cf. Petty*, 359 U.S. at 280 - 81.

Appendix C

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY IN LEADBEATER V. PORT AUTHORITY TRANS-HUDSON CORPORATION DATED APRIL 14, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Honorable Nicholas H. Politan

HUGH H. WELSH
One PATH Plaza
Jersey City, New Jersey 07306
(201) 622-6600 x 8770
(212) 466-8770
Attorney for Defendant,
PORT AUTHORITY TRANS-HUDSON CORPORATION

Civil Action

No. 86-5103

Plaintiff,

JOHN LEADBEATER,

vs.

Defendant,

PORT AUTHORITY TRANS-HUDSON CORPORATION.

ORDER DISMISSING THE COMPLAINT

THIS MATTER having been opened to the Court by Hugh

Appendix D

H. Welsh, Esq., attorney for the defendant, Port Authority Trans-Hudson Corporation, Donald F. Burke, Esq., appearing, and the Court having reviewed the papers and arguments submitted by counsel in support of and in opposition to this motion, and for good cause shown;

IT IS on this 14th day of April, 1988,

ORDERED that plaintiff's Complaint is hereby dismissed for lack of subject matter jurisdiction pursuant to the Eleventh Amendment of the United States Constitution.

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

APPENDIX E — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN FEENEY V. PORT AUTHORITY TRANS-HUDSON CORPORATION DECIDED APRIL 26, 1989 (NOW REPORTED 873 F.2d 628)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 711 August Term, 1988

(Argued February 8, 1989)

Docket No. 88-7797

PATRICK FEENEY,

Plaintiff-Appellant,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant-Appellee.

Before: KEARSE and WINTER, *Circuit Judges,* and SWEET, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York (Robert J. Ward, *Judge*) granting the defendant's motion for judgment pursuant to Fed. R. Civ. P. 12(c). We conclude that the immunity from suit in

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* The Hon. Robert W. Sweet, United States District Judge for the Southern District of New York, sitting by designation.

federal courts provided to the states by the Eleventh Amendment either does not extend to the defendant or has been waived. We therefore reverse.

RICHARD W. MILLER, Islip, New York (Peter M.J. Reilly, O'Hagan & Reilly, Islip, New York, of counsel), *for Plaintiff-Appellant.*

ARTHUR P. BERG, New York, New York (Joseph Lesser, Anne M. Tannenbaum, New York, New York, of counsel), *for Defendant-Appellee.*

WINTER, *Circuit Judge:*

The sole issue in this case is whether the Port Authority of New York and New Jersey ("Port Authority") is immune from suit in federal courts by virtue of the Eleventh Amendment.[1] We conclude that the Eleventh Amendment immunity either does not extend to the defendant or has been waived.

The appellant, Patrick Feeney, is an employee of the Port Authority Trans-Hudson Corporation ("PATH"), which operates rail facilities between New York and New Jersey and is a wholly-owned subsidiary of the Port Authority. Feeney brought this action for damages for personal injuries allegedly suffered in the course of his employment. He asserted these claims under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* (1982), the Boiler Inspection Act, 45 U.S.C. §§ 22 *et seq.* (1982), and the Safety Appliance Act, 45 U.S.C. §§ 1 *et seq.* (1982). PATH moved pursuant to Fed. R. Civ. P. 12(c) for dismissal of the complaint for lack of subject matter jurisdiction on the ground

that PATH enjoys immunity from suit in federal courts because of the Eleventh Amendment. Judge Ward granted PATH's motion, and Feeney appeals. Feeney claims that the Port Authority is not a state agency for Eleventh Amendment purposes and, in the alternative, that, if it is such a state agency, its Eleventh Amendment immunity has been waived.[2] We agree with both arguments and reverse.

The claim that the Port Authority is not a state agency for Eleventh Amendment purposes requires that we examine it in some detail. The Port Authority is "a body corporate and politic" created in 1921 by an interstate compact between New York and New Jersey. The compact was approved by the United States Congress. N.Y. Unconsol. Laws § 6404 (McKinney 1979) and N.J. Stat. Ann. § 32:1-4 (West 1963 & Supp. 1988). The Port Authority is to "be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port [of New York] . . . ," N.Y. Unconsol. Laws § 6459 (McKinney 1979) and N.J. Stat. Ann. § 32:1-33 (West 1963 & Supp. 1988), and is authorized to:

> purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof: and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it.

(footnotes omitted). N.Y. Unconsol. Laws § 6407 (McKinney 1979) and N.J. Stat. Ann. § 32:1-7 (West 1963).

Appendix E

The powers of the Port Authority are exercised by twelve commissioners, six being selected by each of the participating states. N.Y. Unconsol. Laws § 6405 (McKinney 1979) and N.J. Stat. Ann. § 32:1-5 (West 1963). The Commissioners' actions are in turn subject to veto by the governor of either state. *See* N.Y. Unconsol. Laws § 7151 (McKinney 1979) and N.J. Stat. Ann. §§ 32:2-6 *et seq.* (West 1963 & Supp. 1988). The compact states that "[t]he [P]ort [A]uthority shall not pledge the credit of either state except by and with the authority of the legislature thereof." N.Y. Unconsol. Laws § 6408 (McKinney 1979) and N.J. Stat. Ann. § 32:1-8 (West 1963). *See also,* 1930 Report of the Att'y Gen. 124 (bonds issued by Port Authority are not obligations of the state of New York). In the event the Port Authority's revenues are inadequate to meet its expenses, each state is obligated only to "appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the [P]ort [A]uthority and approved by the governors of the two states, but . . . only to the extent of one hundred thousand dollars in any one year." N.Y. Unconsol. Laws § 6416 (McKinney 1979) and N.J. Stat. Ann. § 32:1-16 (West 1963). The Port Authority may not incur any obligations for such administrative expenses until such appropriations are made. N.Y. Unconsol. Laws § 6418 (McKinney 1979) and N.J. Stat. Ann. § 32:1-18 (West 1963).

We conclude that the Port Authority, and therefore PATH, is not a state agency for Eleventh Amendment purposes. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Supreme Court held that the Tahoe Regional Planning Agency ("TRPA"), a bi-state authority established by California and Nevada to regulate the development of the Lake Tahoe region, was not a state agency for purposes of Eleventh Amendment immunity. The Court stated:

Appendix E

> By its terms, the protection afforded by [the Eleventh] Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."
>
> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the State themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

Lake Country, 440 U.S. at 400-01. (footnotes omitted).

In denying the TRPA the protection of the Eleventh Amendment, the Court cited the following factors: (i) the compact referred to the TRPA as a political subdivision of the states; (ii) six of the ten governing members of TRPA were appointed by

counties and four by the states; (iii) TRPA's funding was provided by counties, not by the states; (iv) TRPA's function, the regulation of land, is traditionally a function of local, not state, government; (v) the states had no veto over the actions of the TRPA; and (vi) TRPA's obligations were not binding on the states. *Id.* at 401-02.

Taking factors (i)-(v) into account, it appears that the case for denying Eleventh Amendment immunity to TRPA was stronger than is the case for denying it to PATH. Favoring non-application of the Eleventh Amendment immunity to PATH is the fact that the compact between New York and New Jersey describes the Port Authority as a "municipal corporate instrumentality," N.Y. Unconsol. Laws § 6459 (McKinney 1979) and N.J. Stat. Ann. § 32:1-33 (West 1963), language consistent with its being a political subsidivision. Moreover, the Port Authority is to be self-sustaining financially, and its functions are localized and focus only on the port of New York. Favoring application are the facts that all of the Port Authority Commissioners are appointed by the states, and the governors of the two states have a veto over the Commissioners' actions.

We do not believe, however, that the differences between the Port Authority and the TRPA constitute the requisite "good reason," *Lake Country*, 440 U.S. at 401, to conclude that the Port Authority was intended to be a state agency for Eleventh Amendment purposes. In particular, we believe that factor (vi), whether liability will place the state treasury at risk, although not exclusively determinative, is the single most important factor. *See Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 38 (2d Cir. 1977); *see also*, Comment, *Eleventh Amendment Immunity and State-owned Vessels*, 57 Tul. L. Rev. 1523, 1528 (1983) (in determining whether to extend the Eleventh Amendment

to a state agency "[t]he essential, but not exclusive, test is whether a monetary judgment against the agency would be satisfied out of the state treasury") (footnotes omitted). In cases where doubt has existed as to the availability of Eleventh Amendment immunity, the Supreme Court has emphasized the exposure of the state treasury as a critical factor. In *Edelman v. Jordan*, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974), for example, the Supreme Court stated that "[i]t is . . . well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment . . . . [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663 (citations omitted); *see also, Lake Country*, 440 U.S. at 400-01.

We believe it clear that a judgment against PATH would not be enforceable against either New York or New Jersey. The Port Authority is explicitly barred from pledging the credit of either state or from borrowing money in any name but its own. Even the provision for the appropriation of moneys for administrative expenses up to $100,000 per year requires prior approval by the governor of each state and an actual appropriation before obligations for such expenses may be incurred. Moreover, the phrase "salaries, office and other administrative expenses" clearly limits this essentially optional obligation of the two states to a very narrow category of expenses and thus also evidences an intent to insulate the states' treasuries from the vast bulk of the Port Authority's operating and capital expenses, including personal injury judgments. No provision commits the treasuries of the two states to satisfy judgments against the Port Authority, therefore. We believe that this insulation of state treasuries from the liabilities of the Port Authority outweighs both the methods

of appointment and gubernatorial veto so far as the Eleventh Amendment immunity is concerned.

We realize that our holding creates a conflict between ourselves and the Third Circuit regarding PATH, *see Port Authority Police Benevolent Ass'n, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir.), *cert. denied*, 108 S. Ct. 344 (1987), that can be resolved only by the Supreme Court. That decision, however, was based on the Third Circuit's understanding that in the event that "a judgment were entered against the Authority that was serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses." *Port Authority Police Benevolent Ass'n*, 819 F.2d at 416. To the extent that this statement implies that the states *must* make such an appropriation, it appears to be in error. Under the compact, states are obligated to provide funds for Port Authority administrative expenses up to $100,000 only if their respective governors approve the request. Judgments in the present action thus cannot lead to a depletion of state treasuries without gubernatorial consent.

Although we would normally be most reluctant to create a conflict with another circuit on a close issue, we believe that the issue is not close in light of legislation enacted by New York and New Jersey stating that the Port Authority may be sued *in federal courts*. Even if the Port Authority enjoys Eleventh Amendment immunity, therefore, it has been waived. We turn now to that issue.

In 1950 and 1951 New York and New Jersey respectively enacted legislation that "consent[ed] to suits, actions or proceedings of any form or nature at law, in equity or otherwise . . . against the [Port Authority] . . . " N.Y. Unconsol. Laws

§ 7101 (McKinney 1979) and N.J. Stat. Ann. § 32:1-157 (West 1963). "Venue" for actions against the Port Authority consented to by this legislation, which include actions sounding in tort, expressly includes the federal courts. N.Y. Unconsol. Laws § 7106 (McKinney 1979) and N.J. Stat. Ann. § 32:1-162 (West 1963). The provision states in pertinent part:

> venue in any suit, action or proceeding against the [P]ort [A]uthority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district.

We acknowledge that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985), *reh'g denied*, 473 U.S. 926 (1985), the Supreme Court stated that "a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." ' " (citation omitted). *See also, Edelman v. Jordan*, 415 U.S. at 673.

PATH argues that the language of the legislation in question is not sufficiently explicit to satisfy the test set out in *Atascadero State Hospital* and *Edelman*. Relying upon the Supreme Court's statement that " '[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued,' " *Welch v. Texas Dep't of Highways and Public Transportation*, 107 S. Ct. 2941, 2946 (1987) (citation omitted) (emphasis in original), PATH argues that the legislation governing the Port Authority's amenability to suit merely reflects the states' intention to waive the Port Authority's claim to sovereign

immunity rather than its claim to Eleventh Amendment immunity.

PATH's argument, however, focuses solely upon the provisions allowing suits to be brought against the Port Authority, N.Y. Unconsol. Laws § 7101 (McKinney 1979) and N.J. Stat. Ann. § 32:1-157 (West 1963), and simply ignores the language of the legislation quoted above that expressly states that such suits may be brought in federal courts. Moreover, what legislative history there is indicates that this result was consciously intended. The 1950 New York State Legislative Annual thus refers to *Howell v. Port of New York Authority*, 34 F. Supp. 797 (D.N.J. 1940) as a decision that Section 7106 was designed to overturn. 1950 New York State Legislative Annual 203-04. In *Howell*, the court granted a motion to dismiss based on sovereign immunity and the Eleventh Amendment. Although the decisions cited in support of the dismissal appear to be exclusively sovereign immunity cases, *Howell* concluded that the Port Authority was a state agency rather than a political subdivision, a conclusion that would support immunity under the Eleventh Amendment. 34 F. Supp. at 800-01.

We concede that the statute's use of the term "venue" is somewhat anomalous in the Eleventh Amendment context. We conclude, however, that the use of that term in no way undermines our conclusion that the provision evidences an intent to allow the Port Authority to be sued in the designated federal courts and is thus an explicit waiver, albeit partial, of the Eleventh Amendment. If such an intent is not attributed to the provision, then the provision is entirely meaningless. PATH's sole attempt to give meaning to the language in question is to argue that it relates to actions that may be brought in federal court where Congress has abrogated the Eleventh Amendment. PATH has failed to provide specific examples of any such cases, however. In any event, this argument is wholly unconvincing. First, it is

inconsistent with the Legislative Annual's reference to *Howell*. Second, where Congress has abrogated the Eleventh Amendment immunity, states hardly need pass legislation waiving that abrogated immunity and have no power to determine the proper "venue" for actions brought pursuant to the abrogation.

We conclude, therefore, that the statutory provision establishing "venue" for suits against the Port Authority in United States courts is a waiver of the Eleventh Amendment.[3]

Reversed and remanded.

Appendix E

FOOTNOTES

1. The Eleventh Amendment provides

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Eleventh Amendment has been construed to prevent a state from being sued in federal court by one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

2. Feeney also claims that Congress abrogated PATH's Eleventh Amendment immunity when it enacted the FELA. We disagree. The effect of the FELA on PATH's Eleventh Amendment immunity is governed largely by *Welch v. Texas Dep't of Highways and Public Transportation*, 107 S. Ct. 2941 (1987). In that decision, the Supreme Court stated that abrogation of a state's Eleventh Amendment immunity requires that Congress "express[ ] in unmistakable statutory language its intention to allow States to be sued in federal court . . . ," *Welch*, 107 S. Ct. at 2947, and a " 'general authorization for suit in federal court is not the kind, of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' " *Id.* (citation omitted). Applying this rationale to the Jones Act, the Court held that the statutory language extending that Act to " 'any seaman who shall suffer personal injury in the course of his employment,' . . . does not authorize suits against the States in federal court." *Id.* (citations omitted) (emphasis omitted).

The Court did not, however, limit its opinion to the Jones

Act. Instead, it went on to overrule *Parden v. Terminal Railway of Ala. State Docks Dep't*, 377 U.S. 184, *reh'g denied*, 377 U.S. 1010 (1964), a decision holding that Alabama had waived its Eleventh Amendment immunity when it decided to enter the railroad business subsequent to Congressional enactment of the FELA. The *Welch* Court clearly indicated that *Parden* should not be relied upon either to qualify or to limit the Court's decision in *Welch*. The *Welch* Court thus was at pains to repudiate *Parden's* conclusion that the FELA language applying it to "every common carrier by railroad" evidenced a Congressional intent to abrogate the Eleventh Amendment immunity. The Court stated that *Parden* reflected a "mistaken[ ] reli[ance] on cases holding that general language in the Safety Appliance Act . . . and the Railway Labor Act . . . made those statutes applicable to the *States*." *Welch*, 107 S. Ct. at 2947 (citations omitted) (emphasis added). The *Welch* Court further stated that "*Parden's* discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law." *Id.* at 2948. Finally, the Court held that "to the extent that *Parden v. Terminal Railway, supra*, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." *Id.* (footnote omitted). Because the pertinent language of the FELA is no more specific than the language of the Jones Act regarding the Eleventh Amendment, a claim that the FELA abrogates PATH's Eleventh Amendment immunity is no longer sustainable.

3. PATH also relies on *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (per curiam), *reh'g denied*, 451 U.S. 933 (1981), which involved a suit brought by an association of nursing homes against an agency of the state of Florida. The association sought retroactive relief for the state's previous failure to reimburse the nursing homes

as required by the state's participation in the federal Medicaid program. The Supreme Court held that the Eleventh Amendment barred the Suit. The Court stated that: (i) "the 'mere fact that a State participates in a Program through which the Federal Government provides assistance . . . is not sufficient to establish consent on the part of the State to be sued in the federal courts' "; (ii) a "State's general waiver of sovereign immunity . . . 'does not constitute a Waiver by the State of its constitutional immunity under the Eleventh Amendment from suit in federal court' "; and (iii) "the fact that the [State] agreed explicitly to obey federal law in administering the program can hardly be deemed an express waiver of Eleventh Amendment immunity." *Id.* at 150 (citation omitted). We fail to see the relevance of that holding in the context of a provision that expressly allows actions to be brought in federal courts.

APPENDIX F — OPINION OF JUDGE BARRY FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY IN MC INTOSH, *ET AL.*, (BENITZ) V. PORT AUTHORITY TRANS-HUDSON CORPORATION DATED APRIL 6, 1988

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EDWARD MC INTOSH,
Plaintiff,
vs.
PORT OF AUTHORITY OF NEW YORK & NEW JERSEY and MIKE TAGLIETTA,
Defendants.

Civil Action No. 86-2536

WERNER O. QUAST,
Plaintiff,
vs.
PORT AUTHORITY TRANS-HUDSON CORP., (PATH),
Defendant.

Civil Action No. 87-36

PATRICK J. MUELLER,
Plaintiff,
vs.
NEW JERSEY TRANSIT-RAIL OPERATIONS, INC.,
Defendant.

Civil Action No. 87-932

Appendix F

LEONARD BENITEZ, Plaintiff, vs. PORT AUTHORITY TRANS-HUDSON CORP., (PATH), Defendant.	Civil Action No. 87-1365
DANIEL J. O'CONNELL, Plaintiff, vs. NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant.	Civil Action No. 87-1716
EDWARD J. FLILLER, Plaintiff, vs. NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant.	Civil Action No. 87-1862
LAURENCE O'HALLERAN, Plaintiff, vs. NEW JERSEY TRANSIT RAIL OPERATIONS, INC., Defendant.	Civil Action No. 87-2266

Appendix F

CRAIG A. CONLON,
Plaintiff,

vs.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Defendant.

Civil Action
No. 87-4689

BARRY, District Judge

In June of 1987, a majority of the Justices of the Supreme Court of the United States held, in *Welch v. State Dept of Highways and Public Transportation*, 107 S. Ct. 2941 (1987), that to the extent that *Parden v. Terminal Railway of Alabama Docks Dep't*, 377 U.S. 184 (1964) was inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress be expressed in unmistakenly clear language, *Parden* was overruled. By opinion and order filed January 26, 1988, the Hon. Alfred M. Wolin concluded that based upon *Welch*, he lacked subject matter jurisdiction over the case before him, finding the significance of *Welch* to be "that although the Jones Act [46 U.S.C. § 688] applied the remedial provisions of the FELA [Federal Employer's Liability Act, 53 Stat. 1404, 45 U.S.C. §§ 51-60] to seaman [sic], a majority of the court recognized that in neither of these pieces of legislation did Congress expressly abrogate states' immunity." *Fitchik v. New Jersey Transit Rail Operations*, ____ F. Supp. ____ , Civ. No. 86-3060 (D.N.J., filed Jan. 26, 1988), sl. op. at 7-8.

As a result of *Welch* and *Fitchik*, several and perhaps all of the judges of this court are reviewing the FELA cases assigned to them. Before me now, variously on Orders to Show Cause

or Motions to Dismiss for lack of subject matter jurisdiction, are eight such cases. The defendant in each case is either New Jersey Transit Rail Operations, Inc. or the Port Authority Trans-Hudson Corp. (PATH), the Port Authority of New York and New Jersey's wholly owned subsidiary. New Jersey Transit Rail Operations, Inc. is concededly the arm or alter ego of the State of New Jersey and PATH of New York and New Jersey. All plaintiffs were employees of one of those defendants at the time of the incidents upon which they sue.

I find no persuasive reason why *Welch* and *Fitchik* should not be applied to the FELA cases pending before me and thus reach the same conclusion as Judge Wolin for the reasons expressed in his opinion. The decision as to whether some or all of these cases should be dismissed, however, is dependent upon whether *Welch* is to be applied retroactively or prospectively, an issue not addressed in *Welch* or *Fitchik* and not raised by any party before me, although the parties have been given the opportunity to submit briefs on this issue, and have availed themselves of that opportunity.[1]

Resolution of the issue of retroactivity v. prospectivity is easily reached: "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 379 (1981).[2]

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1. *Fitchik* is now on appeal to the Court of Appeals for the Third Circuit. It would seem appropriate that my decision should be before the Court of Appeals to be consolidated with the *Fitchik* appeal so that the court may consider, if it wishes, the brief discussion of retroactivity versus prospectivity that will follow.

2. Plaintiffs would have me limit *Firestone Tire & Rubber Co.* to say

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Eleventh Amendment immunity "partakes of the nature of a jurisdictional bar". *Welch, supra,* 107 S. Ct. at 2947, n.6, quoting *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). *A fortiori,* I have no jurisdiction over the cases pending before me and, thus, no discretion to consider the merits of those cases.

But jurisdiction aside, "It is a time honored principle that courts will apply the law in effect at the time they decide a case. *See United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 102 (1801). As a result, a recent decision is generally applied even to a dispute that arose prior to the court's holding." *Mineo v. Port Authority of New York and New Jersey,* 779 F.2d 939, 943 (3d Cir. 1985) (footnote omitted). Where, however, inequitable results will flow from the application of this retroactivity precept, courts may determine not to apply a decision retroactively. *Id.* at 943-44.

Applying the familiar *Chevron Oil (Chevron Oil v. Huson,* 404 U.S. 97 (1971)) considerations to the cases before me, it is quite clear that there should be no deviation from the general rule. Under *Chevron Oil,* three considerations bear upon the issue

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"merely that an appellate court cannot decide the merits of an appeal over which it does not have proper jurisdiction" unless "the appellant would otherwise be foreclosed from obtaining review on the merits." Br. of Plaintiffs Mueller, Benitez, Fliller, at 3, n.3. *Firestone* implies no such limitation, as other courts have recognized. *See, e.g. United States v. Kimberlin,* 776 F.2d 1344, 1346 (7th Cir. 1985). Moreover, as will be made clear, plaintiffs will be heard on the merits in another forum.

of whether a holding is to be retroactively or prospectively applied.[3] First, a holding to be applied prospectively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed by earlier cases. Second, consideration must be given to whether a retroactive application will further or retard the operation of the holding in question. Third, consideration must be given as well to whether retroactive application could produce substantial inequitable results in individual cases. *Chevron Oil*, 404 U.S. at 106-07.

With reference to the first consideration, a majority of the Court in *Welch* recognized the continued validity of the Court's unanimous decision in *Hans v. Louisiana*, 134 U.S. 1 (1890) which, as relevant here, established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity. As Justice Powell wrote, "the fundamental principle enunciated in *Hans* has been among the most stable in our constitutional jurisprudence", with "the doctrine of sovereign immunity play[ing] a vital role in our federal system", "adhered to without exception by this Court for almost a century" with "*Hans* . . . reaffirmed in case after case." 107 S. Ct. at 2952-53, 2956 and n.27. Similarly the court has required, before and after *Parden*, that Congress "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Id.* at 2946. The result

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3. The parameters of "retroactive" and "prospective" are somewhat murky. Thus, one can conclude that a holding should be applied retroactively, but whether that retroactive application should extend merely to pending cases or whether it should extend further to include cases in which judgments have become final is not easily susceptible of resolution nor one I need decide. And one can conclude that a holding should be applied prospectively but whether "prospective" should or should not include even the case in which the holding is reached is not as clear as one would wish.

in *Parden*, in which such "unmistakable language" was not deemed necessary and the mere operation of a common carrier railroad in interstate commerce by a state was deemed to constitute a waiver of that state's sovereign immunity and consent to suit brought in a federal court by employees of the railroad under the FELA, was summarily dismissed as having been reached by a mistaken reliance on cases which did not support the Court's holding on the Eleventh Amendment issue. *Id.* at 2947 and n.7.

Moreover, the *Welch* majority took no issue with the conclusion of the Court of Appeals that, although *Parden* had not been expressly overruled, it had "overtly been limited by later decisions as its full implications . . . surfaced." *Id.* at 2944. Importantly, the majority itself concluded that the Court's cases subsequent to *Parden* "leave no doubt that *Parden's* discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law" for in those cases "the Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity." *Id.* at 2948. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II); Quern v. Jordan*, 440 U.S. 332 (1979); *Employees v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279 (1973). To the extent that *Parden* was inconsistent with that requirement, *Parden* was explicitly overruled.

Thus, a new principle of law was not established by the holding in *Welch*, even though the aspect of *Parden* relevant here was overruled, and an issue of first impression was not decided, much less an issue not clearly foreshadowed by earlier cases. It is clear, of course, that litigants — mistakenly or otherwise — relied on *Parden* given the large number of FELA cases pending

in the federal courts. It is also clear that those litigants have a remedy, albeit not in this court.

With reference to the second *Chevron* consideration, retroactive operation will advance the operation of the holding in *Welch*, not retard it. It must be remembered that what is at issue here is the very power of a court to adjudicate, rather than merely a particular issue of law to *be* adjudicated. Thus, if a court lacks jurisdiction because a decision binding on that court says so, it follows that the court cannot be deemed to have jurisdiction merely because of the fortuity of the date on which a particular matter was filed, any exegesis into retroactivity versus prospectivity notwithstanding. *See Firestone Tire & Rubber Co., supra.* Stated somewhat differently, it would defy common sense, not to mention law, to conclude that I have subject matter jurisdiction over those cases filed before June 25, 1987, the date of the *Welch* decision, but no subject matter jurisdiction over those cases filed thereafter. Jurisdiction is jurisdiction and *Welch* tells me that I do not have it and never did. It would "advance the operation" of the holding in *Welch* to say so.[4]

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4. In *Marathon Oil v. Northern Pipeline*, 458 U.S. 50 (1981), where Congress' grant of jurisdiction to the bankruptcy courts could not be sustained and where the Court determined that its holding should be applied prospectively only and its judgment stayed, the recognition of lack of jurisdiction in the bankruptcy courts result in an immediate change whereby the district courts, in response to the recommendation of the Judicial Conference of the United States, adopted local rules for the processing of bankruptcy and bankruptcy related cases with the orders entered in related proceedings deemed to be orders of the district courts, not of the bankruptcy courts. Interestingly, while reciting the nonretroactivity holding of *Marathon*, the Third Circuit determined that there was no hardship in a retroactive application of the *Marathon* holding in the case before it because the case had not yet been tried, and when it was tried, it would be tried in the district court, not in the bankruptcy court. *Coastal Steel v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 199 (3d Cir. 1983).

Appendix F

Finally, at least in the vast majority of individual cases, "substantial inequitable results" should not eventuate. Justice Powell discussed this very point, albeit with reference to Jones Act cases, noting that relief may often be obtained through suits against state officials rather than the state itself or through injunctive or other prospective remedies and that states may provide relief by waiving their immunity from suit in state court on state court claims. Ms. Welch's ability to file a workers' compensation claim against Texas under the Texas Tort Claims Act was deemed sufficient. *Id.* at 2953 and n.19.

One does not have to look for a remedy here beyond the words of the FELA itself which provides, at § 56, that the jurisdiction of the courts of the United States shall be concurrent with that of the courts of the several states, a provision not found in the Jones Act. Certainly, the Supreme Court of the United States has from the inception of § 56 consistently recognized the ability of an employee to sue his state-operated railroad in state court under the FELA; certainly, too, the State of New Jersey has over those many years not concluded to the contrary. And if the cases now pending before me are refiled in state court, it seems clear that principles of equitable tolling should be applied were the bar of the statute of limitations to be raised. Cf. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

One final observation. Defendants have threatened that, based upon *Welch*, they may well move to dismiss all FELA actions pending in the state courts. I find utterly nothing in *Welch* which would support such a motion. If I am wrong, however, I would anticipate that the state courts would be compelled to apply *Welch* prospectively only, thereby providing plaintiffs with the remedy that defendants may seek to deny them.

Appendix F

The actions pending before me are regrettably but necessarily dismissed for lack of subject-matter jurisdiction.

APPENDIX G — STATUTES INVOLVED

§ 7101. Consent to suits against the Port Authority

Upon the concurrence of the state of New Jersey in accordance with section twelve hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five, inclusive, hereof.

§ 7106. Venue of action; consent to liability for tortious acts

The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings. Although the port authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the port authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

§ 6416. Appropriations for expenses

ARTICLE XV

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts,

annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

§ 6418. Incurring obligations for expenses

ARTICLE XVII

Unless and until otherwise determined by the action of the legislatures of the two states, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article fifteen, prior to the making of appropriations adequate to meet the same.

32:1-157.

Upon the concurrence of the State of New York in accordance with section twelve hereof, the States of New York and New Jersey consent to suits, actions or proceedings of any form or nature of law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five, inclusive, hereof.

32:1-162. Venue of suits; consent to liability for tortious acts

The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the Port Authority shall be laid within a county or a judicial district, established by one of said States or by the United States, and situated wholly

or partially within the Port of New York District. The Port Authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings. Although the Port Authority is engaged in the performance of governmental functions, the said two States consent to liability on the part of the Port Authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

32:1-16. Appropriations for expenses

ARTICLE XV.

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

Supreme Court, U.S.
FILED
OCT 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LEONARDO BENITEZ AND JOHN LEADBEATER,

Petitioners,

– against –

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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5 pp

QUESTION PRESENTED

Does the suability statute applicable to Respondent Port Authority Trans-Hudson Corporation, specifically the reference to federal judicial districts in the general purpose venue provision, constitute a waiver of Eleventh Amendment immunity in light of this Court's stringent standards for a finding of waiver.

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REASONS FOR DENYING THE WRIT

The Court Below Correctly Decided The Issue In Accordance With Controlling Precedent Of This Court

Respondent, Port Authority Trans-Hudson Corporation (PATH) agrees with Petitioners that there is a direct conflict between the decision of the Third Circuit in the instant matter, namely, *Leadbeater v. Port Authority Trans-Hudson Corporation* (App. D, A18-28), reported at 873 F.2d 45, *reh. den.*, ____ F.2d ____ (3d Cir. 1989), and the decision of the Second Circuit in *Feeney v. Port Authority Trans-Hudson Corporation* (App. C, A4-17), reported at 873 F.2d 628, *reh. den.*, ____ F.2d ____ (2d Cir. 1989).

In *Feeney* the Second Circuit held first that PATH does not enjoy Eleventh Amendment immunity, and second that even if it did, immunity had been waived (A6) Indeed, Respondent, itself, has petitioned this Court for a Writ of Certiorari in the *Feeney* case and thus Respondent obviously acknowledges that the issue raised by the instant petition warrants review by this Court.

However, irrespective of the attempt by these Petitioners to state more broadly the question presented for purposes of the instant petition, this case properly raises only the question of waiver, not the underlying question of PATH's status as a state agency for Eleventh Amendment purposes; whereas in *Feeney* both questions are directly placed in issue.

More specifically, the instant Petitioners at no time contested below the fact that PATH was constitutionally entitled to Eleventh Amendment immunity. In this regard the Third Circuit noted:

> "This appeal presents the discrete question whether plaintiffs' suits in federal court against P.A.T.H. are barred by the eleventh amendment. In [the earlier case of] *Port Authority Police Benevolent Association v. Port Authority*, 819 F.2d 413 (3d Cir.), *cert. denied*, 108 S.Ct. 344 (1987), we concluded that the Port Authority is an arm of the compacting states entitled to eleventh amendment immunity . . . P.A.T.H. contends that as a matter of federal law it has eleventh amendment immunity to the same extent as the Port Authority. Plaintiffs do not contend otherwise, and therefore we proceed on that premise." (citations omitted) (A20)

Proceeding on that premise, the Third Circuit held against the instant Petitioners, ruling that the bi-state suability statute did not waive PATH's Eleventh Amendment immunity. (A 24-25)

Thus, the Second Circuit's decision in *Feeney* indeed is in direct conflict with the Third Circuit's decision in the instant matter. However, it is the Third Circuit's decision which has correctly decided the issue by properly applying the past precedents of this Court. The Second Circuit decision in *Feeney*, on the other hand, simply fails to apply these precedents and thus warrants review by this Court. The Court is respectfully referred to the Petition for a Writ of Certiorari filed in *Feeney v. Port Authority Trans-Hudson Corporation*, Docket No. 89-386.

CONCLUSION

Inasmuch as this Court's decision in *Feeney* will resolve the issue presented by the instant petition, this Court should grant the petition in *Feeney* and retain jurisdiction over the instant petition for resolution in accordance with this Court's decision in *Feeney*.

Dated: New York, New York
October, 1989

Respectfully submitted,

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